

DEPARTMENT OF MINES, MINERALS AND ENERGY
VIRGINIA COAL SURFACE MINING RECLAMATION REGULATIONS - AMENDMENTS

4VAC25-130-700.12. Petitions to initiate rule making.

(a) Any person may petition to initiate a proceeding for the issuance, amendment, or repeal of any regulation under the Act. The petition shall be addressed to either the Director of the Division or the Director of the Department and mailed or submitted to the Division Office at Big Stone Gap.

(b) The petition shall be a concise statement of the facts, technical justification, and law which requires issuance, amendment, or repeal of a regulation under the Act and shall indicate whether the petitioner desires a public hearing.

(c) Upon receipt of the petition, the division shall make a preliminary determination whether the petition sets forth facts, technical justification and law which may provide a reasonable basis for issuance, amendment or repeal of a regulation. Facts, technical justification or law previously considered in a petition or rule making on the same issue shall not provide a reasonable basis. The division shall send the preliminary determination to the Director, who may hold a public hearing, conduct an investigation or take other action to determine whether the petition should be granted.

(d) Within 90 days of receipt of the petition, the Director shall issue a written decision to either grant or deny the petition.

(e) If the Director grants the petition, he shall initiate a rule making proceeding pursuant to the Virginia Administrative Process Act, Chapter 1.1:1 (§2.2-4000A ~~9-6.14:1~~ et seq.) of Title 9 of the Code of Virginia. If the Director denies the petition, he shall notify the petitioner in writing, setting forth the reasons for the denial.

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(f) Nothing herein shall be construed as preventing the Director from initiating any rule making proceeding on his own motion.

4VAC25-130-773.21. Improvidently issued permits; rescission procedures.

If the division, under 4VAC25-130-773.20(c)(4), elects to rescind an improvidently issued permit, it shall serve on the permittee a notice of proposed suspension and rescission which includes the reasons for the finding of the division under 4VAC25-130-773.20(b) and states that:

(a) Automatic suspension and rescission. After a specified period of time not to exceed 90 days the permit automatically will become suspended, and not to exceed 90 days thereafter rescinded, unless within those periods the permittee submits proof, and the division finds, that:

(1) The finding of the division under 4VAC25-130-773.20(b) was erroneous;

(2) The permittee or other person responsible has abated the violation on which the finding was based, or paid the penalty or fee, to the satisfaction of the responsible agency;

(3) The violation, penalty or fee is the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; or

(4) Since the finding was made, the permittee has severed any ownership or control link with the person responsible for, and does not continue to be responsible for, the violation, penalty or fee:

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(b) Cessation of operations. After permit suspension or rescission, the permittee shall cease all surface coal mining and reclamation operations under the permit, except for violation abatement and for reclamation and other environmental protection measures as required by the division; and

(c) Right to appeal. The permittee may file an appeal for administrative review of the notice under §2.2-4000A ~~9-6.14:1~~ et seq of the Code of Virginia.

4VAC25-130-775.11. Administrative review.

(a) General. Within 30 days after an applicant or permittee is notified of the decision of the division concerning an application for approval of exploration required under Part 772, a permit for surface coal mining and reclamation operations, a permit revision, a permit renewal, or a transfer, assignment, or sale of permit rights, the applicant, permittee, or any person with an interest which is or may be adversely affected by the decision may request, in writing, a formal public hearing to contest such action with the Director of the Division of Mined Land Reclamation, Drawer 900, Big Stone Gap, VA 24219.

(b) Administrative hearings.

(1) The division shall conduct the formal hearing within 30 days from the receipt of the request. The hearing shall be conducted in accordance with section 2.2-4020 ~~9-6.14:12~~ of the Virginia Administrative Process Act. No person who presided at an informal conference under 4VAC25-130-773.13(c) shall either preside at the hearing or participate in the formal hearing decision and any subsequent appeal.

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(2) The division may, under such conditions as it prescribes, grant such temporary relief as it deems appropriate, pending final determination of the proceeding, if--

(i) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(ii) The person requesting that relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding;

(iii) The relief sought will not adversely affect the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources; and

(iv) The relief sought is not the issuance of a permit where a permit has been denied, in whole or in part, by the division except that continuation under an existing permit may be allowed where the operation has a valid permit issued under Section 45.1-238 of the Act.

(3) The hearing shall be conducted under the following conditions:

(i) The Hearing Officer may administer oaths and affirmations, subpoena witnesses and written or printed materials, compel attendance of witnesses or production of those materials, compel allowable discovery, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining and reclamation operations carried on by the applicant in the general vicinity of the proposed operations.

(ii) A verbatim record of each public hearing required by this section shall be made, and a transcript made available on the motion of any party or by order of the Hearing Officer.

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(iii) Ex parte contacts between representatives of the parties appearing before the Hearing Officer and the Hearing Officer shall be prohibited, unless prior approval is given by the non-contacting party.

(4) Within 30 days after the close of the record, the Director shall issue and furnish the applicant and each person who participated in the hearing, a copy of the Hearing Officer's decision and written findings of fact, and conclusions of law. The decision shall also set forth the right of appeal process.

(5) The burden of proof at such hearings shall be on the party seeking to reverse the decision of the division.

(c) Within fourteen (14) days after the issuance of the Hearing Officer's decision under Subsection (b)(4) above, the applicant, permittee or any other person with an interest which is or may be adversely affected and who appeared and participated in the Hearing, may appeal to the Director or his designee for review of the record and reconsideration of the Hearing Officer's decision. The Director or his designee may also, on his own motion, with notice to the parties, within the same time period, review the record and reconsider the Hearing Officer's decision. No further evidence will be allowed in connection with such review and reconsideration but the Director or his designee may hear further argument, and may also, after considering the record, remand any case for further hearing if he considers such action necessary to develop the facts. Within thirty days of the appeal or motion for review and reconsideration, the Director or his designee shall complete his review of the Hearing Officer's decision and issue a final decision thereon.

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(d) All requests for hearing or appeals for review and reconsideration made under this section shall be filed with the Director, Department of Mines, Minerals and Energy, Post Office Drawer 900, Big Stone Gap, Virginia 24219.

4 VAC 25-130-775.13. Judicial review.

(a) General. Any applicant, or any person with an interest which is or may be adversely affected by the final administrative decision and who has participated in the administrative hearings as an objector may appeal as provided in Paragraph (b) of this section if--

(1) The applicant or person is aggrieved by the Director or his designee's final order under 4 VAC 25-130-775.11; or

(2) Either the division or the Director failed to act within time limits specified in 4 VAC 25-130-775.11.

(b) Judicial review. The final order of the division pursuant to Paragraph (a) of 4 VAC 25-130-775.11 shall be subject to judicial review as provided by the Virginia Administrative Process Act and the rules of the Supreme Court of Virginia as promulgated thereto. The availability of such review shall not be construed to limit the operation of the rights established in Section 520 of the Federal Act.

(c) All notices of appeal for judicial review of a Hearing Officer's final decision, or the final decision on review and reconsideration, shall be filed with the Director, Department of Mines, Minerals and Energy, Post Office Drawer 900, Big Stone Gap, Virginia 24219.

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4VAC25-130-784.20. Subsidence control plan.

(a) Presubsidence survey. Each application must include:

(1) A map of the permit and adjacent areas at a scale of 1:12,000, or larger if determined necessary by the division, showing the location and type of structures and renewable resource lands that subsidence may materially damage or for which the value or reasonably foreseeable use may be diminished by subsidence, and showing the location and type of drinking, domestic, and residential water supplies that could be contaminated, diminished, or interrupted by subsidence.

(2) A narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

(3) A survey of the ~~condition of all noncommercial buildings or occupied residential dwellings and structures related thereto, that may be materially damaged or for which the reasonably foreseeable use may be diminished by subsidence, within the area encompassed by the applicable angle of draw; as well as a survey of the~~ quantity and quality of all drinking, domestic and residential water supplies within the permit area and adjacent area that could be contaminated, diminished or interrupted by subsidence. If the applicant cannot make this survey because the owner will not allow access to the site, the applicant will notify the owner in writing of the effect that denial of access will have as described in 4VAC25-130-817.121(c)(4). The applicant must pay for any technical assessment or engineering evaluation used to determine the ~~premining condition or value of such noncommercial buildings or occupied residential dwellings and~~ ~~premining~~ condition or value of such noncommercial buildings or occupied residential dwellings and

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~~structures related thereto and the~~ quantity and quality of drinking, domestic, or residential water supplies. The applicant must provide copies of the survey and any technical assessment or engineering evaluation to the property owner and the division.

(b) Subsidence control plan. If the survey conducted under subsection (a) of this section shows that no ~~structures,~~ or drinking, domestic, or residential water supplies, or renewable resource lands exist, or that no material damage or diminution in value or reasonably foreseeable use of such structures or lands, and no contamination, diminution or interruption of such water supplies would occur as a result of mine subsidence, and if the division agrees with this conclusion, no further information need be provided under this section. If the survey shows that structures, renewable resource lands, or water supplies exist and that subsidence could cause material damage or diminution in value or reasonably foreseeable use, or contamination, diminution or interruption of protected water supplies, or if the division determines that damage, diminution, in value or foreseeable use, or contamination, diminution, or interruption could occur, the application must include a subsidence control plan that contains the following information:

(1) A description of the method of coal removal, such as longwall mining, room-and-pillar removal or hydraulic mining including the size, sequence and timing of the development of underground workings;

(2) A map of the underground workings that describes the location and extent of the areas in which planned subsidence mining methods will be used and that identifies all areas where the measures described in subdivisions (b)(4), (b)(5), and (b)(7) of this section will be taken to prevent or minimize subsidence and subsidence related damage; and, when applicable, to correct subsidence related material damage;

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(3) A description of the physical conditions, such as depth of cover, seam thickness and lithology of overlaying strata, that affects the likelihood or extent of subsidence and subsidence related damage;

(4) A description of the monitoring, if any, needed to determine the commencement and degree of subsidence so that, when appropriate, other measures can be taken to prevent, reduce, or correct material damage in accordance with 4VAC25-130-817.121(c).

(5) Except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence and subsidence related damage, such as, but not limited to:

(i) Backstowing or backfilling of voids;

(ii) Leaving support pillars of coal;

(iii) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving coal in place; and

(iv) Taking measures on the surface to prevent or minimize material damage or diminution in value of the surface.

(6) A description of the anticipated effects of planned subsidence, if any.

(7) For those areas where planned subsidence is projected to be used, a description of methods to be employed to minimize damage from planned subsidence to noncommercial buildings and occupied residential dwellings and structures related thereto; or the written consent of the owner

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of the structure or facility that minimization measures not be taken; or, unless the anticipated damage would constitute a threat to health or safety, a demonstration that the costs of minimizing damage exceed the anticipated costs or repair.

(8) A description of the measures to be taken in accordance with 4VAC25-130-817.41(j) and 4VAC25-130-817.121(c) to replace adversely affected protected water supplies or to mitigate or remedy any subsidence related material damage to the land and protected structures.

(9) Other information specified by the division as necessary to demonstrate that the operation will be conducted in accordance with 4VAC25-130-817.121.

4VAC25-130-800.51. Administrative review of performance bond forfeiture.

(a) The permittee or surety, if applicable, may request, in writing, a hearing on the division's determination to forfeit the performance bond within 30 days of receipt of the written determination from the division.

(b) A request for hearing shall not operate as a stay of the bond forfeiture decision. Unless the division decides to withhold forfeiture as provided by 4VAC25-130-800.50(a)(2), it shall take immediate steps to collect the necessary performance bond amounts so that it, or its contractor, may complete the reclamation plan and any other regulatory requirements in the most expeditious manner possible, pending administrative and/or judicial review.

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(c)(1) The division shall commence the hearing within 30 days of the hearing request. The hearing shall be conducted in accordance with §2.2-4020 9-6.14:12 of the Code of Virginia by a Hearings Officer appointed by the Director.

(2) The burden of proof at such hearing shall be on the party seeking to reverse the decision of the division.

(3) For the purpose of such hearing, the Hearings Officer may administer oaths and affirmations, subpoena witnesses, written or printed materials, compel attendance of witnesses or production of those materials, compel discovery, and take evidence, including but not limited to site inspections of the land affected.

(4) The Hearings Officer shall cause an accurate verbatim record of the hearing to be made. The division may charge the reasonable cost of preparing such record to any party who requests a copy of the record.

(5) Ex parte contacts between representatives of the parties to the hearing and the Hearings Officer shall be prohibited.

(6) Within 30 days after the close of the record, the division shall issue and furnish the permittee, surety (if applicable) and each person who participated in the hearing with the written findings of fact, conclusion of law, and order of the Hearings Officer with respect to the appeal. The decision of the Hearings Officer shall be final as of the date of issuance, subject to the review and reconsideration by the Director or his designee, provided in Subsection (d).

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(d) Within 14 days after the issuance of the Hearings Officer's decision under Subsection (c)(6), the permittee, surety (if applicable), or any person who participated in the hearing and has an interest which is or may be adversely affected by the decision, may appeal to the Director or his designee for review of the record and reconsideration of the Hearings Officer's decision. The Director or his designee may also on his own motion, with notice to the parties, review the record and reconsider the Hearings Officer's decision within the same time period. No further evidence will be allowed in connection with such review and reconsideration, but the Director or his designee may hear further arguments and may, after considering the record, remand the case for further hearing if he considers such action necessary to develop the facts. Within 30 days of the appeal or motion for review and reconsideration, the Director or his designee shall complete his review of the Hearings Officer's decision and issue a final decision.

(e) All requests for hearing, or appeals for review and reconsideration made under this section; and all notices of appeal for judicial review of a Hearing Officer's final decision, or the final decision on review and reconsideration shall be filed with the Director, ~~Division of Mined Land Reclamation,~~ Department of Mines, Minerals and Energy, Post Office Drawer 900, Big Stone Gap, Virginia 24219.

4VAC25-130-816.43. Diversions.

(a) General requirements.

(1) With the approval of the division, any flow from mined areas abandoned before May 3, 1978, and any flow from undisturbed areas or reclaimed areas, after meeting the criteria of 4

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VAC 25-130-816.46 for siltation structure removal, may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area and to assure the safety of the public. Diversions shall not be used to divert water into underground mines without approval of the division under 4 VAC 25-130-816.41(i).

(2) The diversion and its appurtenant structures shall be designed, located, constructed, maintained, and used to--

(i) Be stable;

(ii) Provide protection against flooding and resultant damage to life and property;

(iii) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to stream flow outside the permit area; and

(iv) Comply with all applicable local, State and Federal laws and regulations.

(3) Temporary diversions shall be removed promptly when no longer needed to achieve the purpose for which they were authorized. The land disturbed by the removal process shall be restored in accordance with this Part. Before diversions are removed, downstream water-treatment facilities previously protected by the diversion shall be modified or removed, as necessary, to prevent overtopping or failure of the facilities. This requirement shall not relieve the permittee from maintaining water-treatment facilities as otherwise required. A permanent diversion or a stream channel reclaimed after the removal of a temporary diversion shall be

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designed and constructed so as to restore or approximate the premining characteristics of the original stream channel including the natural riparian vegetation to promote the recovery and the enhancement of the aquatic habitat.

(4) Diversions which convey water continuously or frequently shall be lined with rock rip rap to at least the normal flow depth, including an allowance for freeboard. Diversions constructed in competent bedrock and portions of channels above normal flow depth shall comply with the velocity limitations of Paragraph (5) below.

(5) The maximum permissible velocity for the following methods of stabilization are:

Vegetated channel constructed in soil	3.5 feet per second
Vegetated channel with jute netting	5.0 feet per second
Rock rip rap lined channel	16.0 feet per second
Channel constructed in competent bedrock	No limit

(6) Channel side slopes shall be no steeper than 1.5h:1v in soil.

(7) Adequate freeboard shall be provided to prevent overtopping. A minimum of 0.3 feet shall be included, with additional freeboard provided at curves, transitions, and other critical sections as required.

(8) When rock rip rap lining is used, consideration shall be given to rip rap size, bedding, and filter material. Rock used for rip rap shall be non-degradable, and non-acid forming such as natural sand and gravel, sandstone or limestone. No clay, shale, or coal shall be used.

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(9) Sediment and other debris shall be removed and the diversion maintained to provide the design requirements throughout its operation.

(10) The division may specify other criteria for diversions to meet the requirements of this section.

(b) Diversion of perennial and intermittent streams.

(1) Diversion of perennial and intermittent streams within the permit area may be approved by the division after making the finding relating to stream buffer zones called for in 4 VAC 25-130-816.57 that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream.

(2) The design capacity of channels for temporary and permanent stream channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream from the diversion.

(3) The requirements of Paragraph (a) (2) (ii) of this section shall be met when the temporary and permanent diversions for perennial and intermittent streams are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) The design and construction of all stream channel diversions of perennial and intermittent streams shall be certified by a qualified registered professional engineer as meeting the standards of this Part and any other criteria set by the division.

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(5) Channels which are constructed in backfilled material shall be formed during the backfilling and grading of the area. Unless the backfill material is of sufficiently low permeability, the channel shall be lined to prevent saturation of the backfill, loss of stream flow, or degradation of groundwater quality.

(6) Rock rip rap lining shall be placed in the channels of all diversions of perennial and intermittent streams to the normal flow depth, including adequate freeboard. Channels constructed in competent bedrock need not be rip rap lined.

(c) Diversion of miscellaneous flows.

(1) Miscellaneous flows, which consist of all flows except for perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the division. Miscellaneous flows shall include ground-water discharges and ephemeral streams.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows shall meet all of the performance standards set forth in Paragraph (a) of this section.

(3) The requirements of Paragraph (a) (2) (ii) of this section shall be met when the temporary and permanent diversions for miscellaneous flows are designed to pass safely the peak runoff of a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion.

(d) In lieu of the requirements of paragraphs (a)(2) through (a)(9), (b)(2) through (b)(6) and (c)(1) through (c)(3) of this section, a natural stream restoration channel design approved by the

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U.S. Army Corps of Engineers as part of an approved U.S. Army Corps of Engineers permit shall be deemed to meet the requirements of this section.

(e d) Steep slope conveyances.

(1) A steep slope conveyance, including but not limited to a rock rip rap flume, concrete flume, or a pipe, shall be used to convey water down steep slopes to stable natural or constructed drainways. Steep slope conveyances shall be constructed at locations where concentrated flows may cause erosion.

(2) The capacity of the conveyance shall be equal to or greater than the capacity of the inlet ditch or drainage structure associated with it.

4 VAC 25-130-816.105. Backfilling and grading; thick overburden.

(a) ~~Thin~~ Thick overburden exists when spoil and other waste materials available from the entire permit area is more than sufficient ~~insufficient~~ to restore the disturbed area to its approximate original contour. More than sufficient ~~Insufficient~~ spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is more ~~less~~ than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfill and grading the surface configuration of the reclaimed area would not:

(1) Closely resemble the surface configuration of the land prior to mining; or

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(2) Blend into and complement the drainage pattern of the surrounding terrain.

(b) Where thick ~~thin~~ overburden occurs within the permit area, the permittee at a minimum shall:

(1) Restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose;

(2) Meet the requirements of 4 VAC 25-130-816.102(a)(2) through (j); and

(3) Dispose of any excess spoil in accordance with 4 VAC 25-130-816.71 through 4 VAC 25-130-816.75.

4 VAC 25-130-817.43. Diversions.

(a) General requirements.

(1) With the approval of the division, any flow from mined areas abandoned before May 3, 1978, and any flow from undisturbed areas or reclaimed areas, after meeting the criteria of 4 VAC 25-130-817.46 for siltation structure removal, may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area and to assure the safety of the public. Diversions shall not be used to divert water into underground mines without approval of the division in accordance with 4 VAC 25-130-817.41(h).

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(2) The diversion and its appurtenant structures shall be designed, located, constructed, and maintained to-

- (i) Be stable;
- (ii) Provide protection against flooding and resultant damage to life and property;
- (iii) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area; and
- (iv) Comply with all applicable local, State, and Federal laws and regulations.

(3) Temporary diversions shall be removed when no longer needed to achieve the purpose for which they were authorized. The land disturbed by the removal process shall be restored in accordance with this Part. Before diversions are removed, downstream water treatment facilities previously protected by the diversion shall be modified or removed, as necessary to prevent overtopping or failure of the facilities. This requirement shall not relieve the permittee from maintaining water treatment facilities as otherwise required. A permanent diversion or a stream channel reclaimed after the removal of a temporary diversion shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel including the natural riparian vegetation to promote the recovery and the enhancement of the aquatic habitat.

(4) Diversions which convey water continuously or frequently shall be lined with rock rip rap to at least the normal flow depth, including an allowance for freeboard. Diversions constructed in competent bedrock and portions of channels above normal flow depth shall comply with the velocity limitations of Paragraph (5) below.

(5) The maximum permissible velocity for the following methods of stabilization are:

Vegetated channel constructed in soil	3.5 feet per second
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Vegetated channel with jute netting	5.0 feet per second
Rock rip rap lined channel	16.0 feet per second
Channel constructed in competent bedrock	No limit

(6) Channel side slopes shall be no steeper than 1.5h:1v in soil.

(7) Adequate freeboard shall be provided to prevent overtopping. A minimum of 0.3 feet shall be included, with additional freeboard provided at curves, transitions, and other critical sections as required.

(8) When rock rip rap lining is used, consideration shall be given to rip rap size, bedding, and filter material. Rock used for rip rap shall be non-degradable, and non-acid forming such as natural sand and gravel, sandstone or limestone. No clay, shale, or coal shall be used.

(9) Sediment and other debris shall be removed and the diversion maintained to provide the design requirements throughout its operation.

(10) The division may specify other criteria for diversions to meet the requirements of this section.

(b) Diversion of perennial and intermittent streams.

(1) Diversion of perennial and intermittent streams within the permit area may be approved by the division after making the finding relating to stream buffer zones called for in 4 VAC 25-130-817.57 that the diversions will not adversely affect the water quantity and quality and related environmental resources of the stream.

(2) The design capacity of channels for temporary and permanent stream channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream from the diversion.

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(3) The requirements of Paragraph (a)(2)(ii) of this section shall be met when the temporary and permanent diversions for perennial and intermittent streams are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) The design and construction of all stream channel diversions of perennial and intermittent streams shall be certified by a qualified registered professional engineer as meeting the standards of this Part and any other criteria set by the division.

(5) Channels which are constructed in backfilled material shall be formed during the backfilling and grading of the area. Unless the backfill material is of sufficiently low permeability, the channel shall be lined to prevent saturation of the backfill, loss of stream flow, or degradation of groundwater quality.

(6) Rock rip rap lining shall be placed in the channels of all diversions of perennial and intermittent streams to the normal flow depth, including adequate freeboard. Channels constructed in competent bedrock need not be rip rap lined.

(c) Diversion of miscellaneous flows.

(1) Miscellaneous flows, which consist of all flows except for perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the division.

Miscellaneous flows shall include ground-water discharges and ephemeral streams.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows shall meet all of the performance standards set forth in Paragraph (a) of this section.

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(3) The requirements of Paragraph (a)(2)(ii) of this section shall be met when the temporary and permanent diversions for miscellaneous flows are designed to pass safely the peak runoff of a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion.

(d) In lieu of the requirements of paragraphs (a)(2) through (a)(9), (b)(2) through (b)(6) and (c)(1) through (c)(3) of this section, a natural stream restoration channel design approved by the U.S. Army Corps of Engineers as part of an approved U.S. Army Corps of Engineers permit shall be deemed to meet the requirements of this section.

(e ~~d~~) Steep slope conveyances.

(1) A steep slope conveyance, including but not limited to a rock rip rap flume, concrete flume, or a pipe, shall be used to convey water down steep slopes to stable natural or constructed drainways. Steep slope conveyances shall be constructed at locations where concentrated flows may cause erosion.

(2) The capacity of the conveyance shall be equal to or greater than the capacity of the inlet ditch or drainage structure associated with it.

4VAC25-130-817.121. Subsidence control.

(a) Measures to prevent or minimize damage.

(1) The permittee shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically

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feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room-and-pillar mining.

(2) If a permittee employs mining technology that provides for planned subsidence in a predictable and controlled manner, the permittee must take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to noncommercial buildings and occupied residential dwellings and structures related thereto except that measures required to minimize material damage to such structures are not required if:

(i) The permittee has the written consent of the structure owners;

(ii) Unless the anticipated damage would constitute a threat to health or safety, the costs of such measures exceed the anticipated costs of repair; or

(iii) The structure owners have denied the permittee access to implement the measures specified in subdivision (a)(2) of this section and the permittee has provided written evidence of his good faith efforts to obtain access. The good faith effort shall include documentation apprising the structure owners that such measures are intended to lessen the potential for property damages or personal injury and that denial of access will not prevent mining.

(b) The permittee shall comply with all provisions of the approved subsidence control plan prepared pursuant to 4VAC25-130-784.20.

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(c) Repair of damage.

(1) Repair of damage to surface lands. The permittee must correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage.

(2) Repair or compensation for damage to noncommercial buildings and dwellings and related structures. The permittee must promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any noncommercial building or occupied residential dwelling or structure related thereto that existed at the time of mining. If repair option is selected, the permittee must fully rehabilitate, restore, or replace the damaged structure. If compensation is selected, the permittee must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence related damage. The permittee may provide compensation by the purchase, before mining, of a noncancelable premium-prepaid insurance policy. The requirements of this subdivision apply only to subsidence related damage caused by underground mining activities conducted after October 24, 1992.

(3) Repair or compensation for damage to other structures. The permittee must, to the extent required under applicable provisions of state law, either correct material damage resulting from subsidence caused to any structures or facilities not protected by subdivision (c)(2) of this section by repairing the damage or compensate the owner of the structures or facilities for the full amount of the decrease in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may

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be accomplished by the purchase before mining of a noncancelable premium-prepaid insurance policy.

~~(4) Rebuttable presumption of causation by subsidence.~~

~~(i) Rebuttable presumption of causation for damage within angle of draw. If damage to any noncommercial building or occupied residential dwelling or structure related thereto occurs as a result of earth movement within an area determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land, a rebuttable presumption exists that the permittee caused the damage. The presumption will normally apply to a 28 degree angle of draw.~~

~~(ii) Approval of site specific angle of draw. A permittee or permit applicant may request that the presumption apply to an angle of draw different from that established in the state program. The division may approve application of the presumption to a site specific angle of draw different from that contained in the state program based on a site specific analysis submitted by an applicant. To establish a site specific angle of draw, an applicant must demonstrate and the division must determine in writing that the proposed angle of draw has a more reasonable basis than the standard set forth in the state program, based on a site specific geotechnical analysis of the potential surface impacts of the mining operation.~~

~~(iii) No presumption where access for presubsidence survey is denied. If the permittee was denied access to the land or property for the purpose of conducting the presubsidence survey in accordance with 4VAC25-130-784.20(a) of this chapter, no rebuttable presumption will exist.~~

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~~(iv) Rebuttal of presumption. The presumption will be rebutted if, for example, the evidence establishes that the damage predated the mining in question, the damage was proximately caused by some other factor or factors and was not proximately caused by subsidence, or the damage occurred outside the surface area within which subsidence was actually caused by the mining in question.~~

~~(v) Information to be considered in determination of causation. In a determination whether damage to protected structures was caused by subsidence from underground mining, all relevant and reasonably available information will be considered by the division.~~

(5) Adjustment of bond amount for subsidence damage. When subsidence related material damage to land, structures, or facilities protected under subdivisions (c)(1) through (c)(3) of this section occurs, or when contamination, diminution, or interruption to a water supply protected under 4VAC25-130-817.41(j) occurs, the permittee shall provide additional performance bond in the amount of the estimated cost of the repairs if the permittee will be repairing, or in the amount of the decrease in value if the permittee will be compensating the owner, or in the amount of the estimated cost to replace the protected water supply if the permittee will be replacing the water supply, until the repair, compensation, or replacement is completed. If repair, compensation or replacement is completed within 90 days of the occurrence of damage or if the permittee demonstrates that the liability insurance required under 4VAC25-130-800.60 provides applicable to exceed one year, if the permittee demonstrates and the division finds in writing that subsidence is not complete, that not all probable subsidence related material damage has occurred to lands or protected structures, or that not all reasonably anticipated changes have occurred affecting the protected water supply, and that, therefore, it would be unreasonable to

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complete within 90 days the repair of the subsidence related material damage to lands or protected structures, or the replacement of protected water supply.

(d) Underground mining activities shall not be conducted beneath or adjacent to:

(1) Public buildings and facilities; (2) Churches, schools, and hospitals; or (3) impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more, unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, such features or facilities. If the division determines that it is necessary in order to minimize the potential for material damage to the features or facilities described above or to any aquifer or body of water that serves as a significant water source for any public water supply system, it may limit the percentage of coal extracted under or adjacent thereto.

(e) If subsidence causes material damage to any of the features or facilities covered by subsection (d) of this section, the division may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified to ensure prevention of further material damage to such features or facilities.

(f) The division shall suspend underground mining activities under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments, or perennial streams, if imminent danger is found to inhabitants of the urbanized areas, cities, towns, or communities.

(g) Within a schedule approved by the division, the permittee shall submit a detailed plan of the underground workings. The detailed plan shall include maps and descriptions, as appropriate, of

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significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the division. Upon request of the permittee, information submitted with the detailed plan may be held as confidential, in accordance with the requirements of 4VAC25-130-773.13(d).

4VAC25-130-842.15. Review of decision not to inspect or enforce.

(a) Any person who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation may ask the division to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for inspection under 4VAC25-130-842.12. The request for review shall be in writing and include a statement of how the person is or may be adversely affected and why the decision merits review.

(b) The division shall conduct the review and inform the person, in writing, of the results of the review within 30 days of receipt of the request. The person alleged to be in violation shall also be given a copy of the results of the review, except that the name of the person who is or may be adversely affected shall not be disclosed unless confidentiality has been waived or disclosure is required under the Virginia Freedom of Information Act (Chapter 21 (§2.1-340 et seq.) of Title 2.1 of the Code of Virginia).

(c) Informal review under this section shall not affect any right to formal review under Section 45.1-249 of the Act or to a citizen's suit under Section 45.1-246.1 of the Act.

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(d) Any person who requested a review of a decision not to inspect or enforce under this section and who is or may be adversely affected by any determination made under Subsection (b) of this section may request review of that determination by filing an application for formal review and request for hearing under the Virginia Administrative Process Act, Chapter 1.1:1 (~~§2.2-4000A 9-6.14:1~~ et seq.) of Title 9 of the Code of Virginia.

4VAC25-130-843.12. Notices of violation.

(a) An authorized representative of the Director shall issue a notice of violation if, on the basis of an inspection pursuant to Section 45.1-244 of the Act, the representative finds a violation of the Act, this chapter, or any condition of a permit or an exploration approval imposed under the Act, or this chapter, which does not create an imminent danger or harm for which a cessation order must be issued under 4VAC25-130-843.11.

(b) A notice of violation issued under this section shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

(1) The nature of the violation;

(2) The remedial action required, which may include interim steps;

(3) A reasonable time for abatement, which may include time for accomplishment of interim steps; and

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(4) A reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies.

(c) An authorized representative of the Director may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by the permittee's lack of diligence. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing by the permittee that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in Paragraph (f) of this section. An extended abatement date pursuant to this section shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

(d)(1) If the permittee fails to meet the time set for abatement, the authorized representative shall issue a cessation order under 4VAC25-130-843.11(b).

(2) If the permittee fails to meet the time set for accomplishment of any interim step the authorized representative may issue a cessation order under 4VAC25-130-843.11(b).

(e) An authorized representative of the Director shall terminate a notice of violation by written notice to the permittee when the representative determines that all violations listed in the notice of violation have been abated. Termination shall not affect the right of the division to assess civil penalties under Part 845 for those violations.

(f) Circumstances which may qualify a coal exploration or a surface coal mining operation for an abatement period of more than 90 days are:

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(1) Where the permittee of an on-going permitted operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within the control of the permittee;

(2) Where there is a valid judicial or administrative order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which the permittee has no other effective legal remedy;

(3) Where the permittee cannot abate within 90 days due to a labor strike;

(4) Where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly would cause more environmental harm than it would prevent; or

(5) Where abatement within 90 days requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act of 1977.

(g) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

(h) If any of the conditions in Paragraph (f) of this section exists, the permittee may request the authorized representative to grant an abatement period exceeding 90 days. The authorized representative shall not grant such an abatement period without the concurrence of the Director and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The permittee shall have the burden of establishing by clear and convincing proof

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that he is entitled to an extension under the provisions of 4VAC25-130-843.12(c) and (f). In determining whether or not to grant an abatement period exceeding 90 days the authorized representative may consider any relevant written or oral information from the permittee or any other source. The authorized representative shall promptly and fully document in the file his reasons for granting or denying the request. The authorized representative's immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for his concurrence or disapproval in the file.

(i) No extension granted under Paragraph (h) of this section may exceed 90 days in length.

Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension in accordance with the procedures of Paragraph (h) of this section.

(j) Any determination made under Subsection (h) of this section shall be subject to formal review pursuant to the provisions of the Virginia Administrative Process Act section 2.2-4000A ~~9-6.14:1~~ et seq. of the Code of Virginia.

4VAC25-130-843.13. Suspension or revocation of permits; pattern of violations.

(a)(1) The Director shall issue a show cause order to a permittee requiring justification as to why his permit and right to mine under the Act should not be suspended or revoked, if the Director determines that a pattern of violations of any requirements of the Act, this chapter, or any permit condition required by the Act exists or has existed, and that the violations were caused by the permittee's willful or unwarranted failure to comply with those requirements or conditions, or if

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the permittee failed to pay the final civil penalty assessment as required by 4VAC25-130-845.20.

Violations by any person conducting surface coal mining operations on behalf of the permittee shall be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

(2) The Director may determine that a pattern of violations exists or has existed based upon two or more inspections of the permit area within any 12-month period, after considering the circumstances, including:

(i) The number of violations, cited on more than one occasion, of the same or related requirements of the Act, this chapter, or the permit;

(ii) The number of violations, cited on more than one occasion, of different requirements of the Act, this chapter, or the permit; and

(iii) The extent to which the violations were isolated departures from lawful conduct.

(3) The Director shall promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of the Act, this chapter, or the permit during three or more inspections of the permit area within any 12-month period. If, after such review, the Director determines that a pattern of violations exists or has existed, he shall issue a show cause order as provided in Paragraph (a)(1) of this section.

(4)(i) In determining the number of violations within any 12-month period, the Director shall consider only violations issued as a result of an inspection carried out pursuant to 4VAC25-130-840.11, 4VAC25-130-842.11 and 4VAC25-130-842.12.

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(ii) The Director may not consider violations issued as a result of inspections other than those mentioned in Paragraph (a)(4)(i) of this section in determining whether to exercise his discretion under Paragraph (a)(2) of this section, except as evidence of the "willful" or "unwarranted" nature of the permittee's failure to comply.

(5) Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the division shall review the permittee's history of violations to determine whether a pattern of violations exists pursuant to this section, and shall issue a show cause order as appropriate pursuant to 4VAC25-130-845.15(b)(2).

(b) The permittee shall have 15 days from receipt of the show cause order to file an answer and request a formal public hearing in writing. The Director shall give thirty days written notice of the date, time and place of the hearing to the permittee, and any intervenor. The public hearing shall be conducted in accordance with section 2.2-4020 ~~9-6.14:12~~ of the Virginia Administrative Process Act. The Director shall publish the notice, if practicable, in a newspaper of general circulation in the area of the surface coal mining and reclamation operations, and shall post it at the division's Big Stone Gap office.

(c) Within 30 days after the hearing, the Hearing Officer shall issue a written decision as to whether a pattern of violations exists, and, if appropriate, an order. The decision and order shall be final, subject to the review and reconsideration by the Director or his designee provided in Paragraph (e) below. If the decision and order revoke or suspend the permit and the permittee's right to mine under the Act, the permittee shall immediately cease surface coal mining operations on the permit area and shall:

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(1) If the permit and right to mine under the Act are revoked, complete reclamation within the time specified in the order; or

(2) If the permit and the right to mine under the Act are suspended, complete all affirmative obligations to abate all conditions, practices or violations, as specified in the order.

(d) Within 14 days after the issuance of a decision or order, the permittee, or any person who participated in the hearing and who has an interest which is or may be adversely affected by the Hearing Officer's decision may appeal to the Director, or his designee (who shall not be the same person who issued the show cause order) for review of the record and reconsideration of the Hearing Officer's decision. The Director or his designee may also, on his own motion, with notice to the parties, made within 14 days of the Hearing Officer's decision, review the record and reconsider the Hearing Officer's decision. No further evidence will be allowed in connection with such review and reconsideration but the Director or his designee may hear further arguments, and may also after considering the record, remand any case for further hearing if he considers such action necessary to develop the facts. Within 30 days of the appeal or motion for review and reconsideration, the Director or his designee shall complete his review of the Hearing Officer's decision and issue a final decision thereon.

(e) All requests for hearing before a Hearing Officer, or appeals for review and reconsideration, made under this section, and all notices of appeal for judicial review of a Hearing Officer's final decision or a final decision on review and reconsideration, shall be filed with the ~~division~~ Director, ~~Division of Mined Land Reclamation,~~ Department of Mines, Minerals and Energy, Post Office Drawer 900, Big Stone Gap, Virginia 24219.

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(f) Any person who owns or controls or has owned or controlled any operations on which the permit has been revoked pursuant to this section may apply for reinstatement pursuant to 4VAC25-130-800.52.

4VAC25-130-843.15. Informal public hearing.

(a) A notice of violation or cessation order which requires cessation of mining, expressly or by necessary implication, shall expire within 30 days after it is served unless an informal public hearing is held or if the notice or order is terminated prior to the hearing. Expiration of a notice or order shall not affect the division's right to assess civil penalties for the violations as set forth in Part 845. For purposes of this section, mining includes (1) extracting coal from the earth or coal waste piles and transporting it within or from the permit area, and (2) the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than at a mine site.

(b) A person issued a notice of violation or cessation order pursuant to this Part may request, in writing within 15 days from service of the notice or order, an informal public hearing to review the issuance of the notice or order. The written request must be submitted to the division's Big Stone Gap Office.

(c) The division shall conduct the informal hearing within 30 days from receipt of the hearing request pursuant to §2.2-4019 ~~9-6.14:11~~ of the Virginia Administrative Process Act. The division shall give as much advance notice as is practicable of the time, place, and subject matter of the informal public hearing to:

- (1) The person to whom the notice or order was issued; and
- (2) Any person who filed a report which led to that notice or order.

(d) The division shall also post notice of the hearing at its Big Stone Gap office and, where practicable, publish it in a newspaper of general circulation in the area of the mine.

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(e) An informal public hearing shall be conducted by a representative of the division, who may accept oral or written arguments and any other relevant information from any person attending.

(f) Within five days after the close of the informal public hearing, the division shall affirm, modify, or vacate the notice or order in writing. The decision shall be sent to-

(1) The person to whom the notice or order was issued; and

(2) Any person who filed a report which led to the notice or order.

(g) The granting of an informal public hearing shall not affect the right of any person to formal review under Section 45.1-249 of the Act.

(h) The person conducting the hearing for the division shall determine whether or not the mine site should be viewed during the hearing. In making this determination the only consideration shall be whether a view of the mine site will assist the person conducting the hearing in reviewing the appropriateness of the enforcement action or of the required remedial action.

4 VAC 25-130-843.16. Formal review of citations.

(a) A person issued a notice of violation or cessation order under 4 VAC 25-130-843.11 or 4 VAC 25-130-843.12, or a person having an interest which is or may be adversely affected by the issuance, modification, vacation, or termination of a notice or order may request review of that action by filing an application for formal review and request for hearing, under [§45.1-249](#) of the Act, within 30 days after receiving notice of the action. A person may also request formal review of the decision rendered under 4 VAC 25-130-843.15, if the request is submitted within 15 days of receipt of the informal public hearing decision.

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(b) The filing of an application for review and request for a hearing under this section shall not operate as a stay of any notice or order, or of any modification, termination, or vacation of either.

(c) Hearings under Subsection (a) of this section shall be conducted by a Hearing Officer appointed by the Director. Within 30 days after the close of the record, the Hearing Officer shall issue a written decision affirming, modifying, terminating, or vacating the notice or order. The decision shall be final, subject to the review and reconsideration by the Director or his designee provided in Subsection (d) below.

(d) Within 14 days after the issuance of a decision the permittee, or any person who participated in the hearing and who has an interest which is or may be adversely affected by the Hearing Officer's decision, may appeal to the Director or his designee for review of the record and reconsideration of the Hearing Officer's decision. The Director or his designee may also, on his own motion, with notice to the parties, made within 14 days of the Hearing Officer's decision, review the record and reconsider the Hearing Officer's decision. No further evidence will be allowed in connection with such review and reconsideration but the Director or his designee may hear further arguments and may also, after considering the record remand any case for further hearing if he considers such action necessary to develop the facts. Within 30 days of the appeal or motion for review and reconsideration, the Director or his designee shall complete his review of the Hearing Officer's decision and issue a final decision thereon.

(e) All requests for hearing before a Hearing Officer, or appeals for review and reconsideration, made under this section, and all notices of appeal for judicial review of a Hearing Officer's final decision, or a final decision on review and reconsideration, shall be filed with the ~~division~~

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Director, ~~Division of Mined Land Reclamation,~~ Department of Mines, Minerals and Energy, Post
Office P.O. Drawer 900, Big Stone Gap, Virginia 24219.

4 VAC 25-130-845.13. Point system.

The division shall use the point system described in this section to determine the amount of the penalty.

(a) Seriousness. The division shall assign up to 10 points based on the seriousness of the violation in accordance with the following.

Points:

0 No actual or potential damage to the environment or threat to public health and safety.

1-2 Slight actual or potential damage to the environment and no actual or potential threat to public health and safety; also violations of administrative requirements which can be quickly corrected and which do not obstruct enforcement by the division.

3-4 Moderately significant actual or potential damage to the environment which can be corrected promptly; also actual or potential minor hazard to the public health and safety; also violations of administrative requirements which can be corrected after some delay, and which tend to hamper or obstruct enforcement by the division.

5-6 Moderately significant actual or potential damage to the environment which can be corrected only after a substantial effort or period of time; also actual or potential moderately significant hazard to the public health and safety.

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7-8 Substantial actual or potential damage to the environment which can be corrected only after a substantial effort or period of time; also extremely serious potential damage to the environment; also substantial actual or potential damage to the public health and safety.

9-10 Extremely serious actual damage to the environment; also extreme actual or potential hazards to the public health and safety.

(b) Negligence.

(1) The division shall assign up to six points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission. Points shall be assessed as follows:

(A) A violation which occurs through no negligence shall be assigned no penalty points for negligence;

(B) A violation which is caused by negligence shall be assigned three points or less, depending on the degree of negligence;

(C) A violation which occurs through a greater degree of fault than negligence shall be assigned four to six points, depending on the degree of fault.

(2) In determining the degree of negligence, involved in a violation and the number of points to be assigned, the following definitions apply:

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(A) No negligence means an inadvertent violation which was unavoidable by the exercise of reasonable care.

(B) Negligence means the failure of a permittee to prevent the occurrence of any violation of the permit or any requirement of the Act or this chapter due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care.

(C) A greater degree of fault than negligence means reckless, knowing, or intentional conduct.

(3) In calculating points to be assigned for negligence, the acts of all persons working on the coal exploration or surface coal mining and reclamation site shall be attributed to the person to whom the notice or order was issued, unless that person establishes that they were acts of deliberate sabotage.

(c) Credit for good faith in attempting to achieve compliance.

(1) The division shall deduct from the total points assigned under Subsections (a) and (b) ~~and (e)~~ points based on the demonstrated good faith of the permittee in attempting to achieve rapid compliance after notification of the violation. Points shall be deducted as follows:

(i) three to four points shall be deducted when the permittee to whom the notice or order was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.

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(ii) one to two points shall be deducted when the permittee to whom the notice or order was issued took prompt and diligent efforts to promptly abate the violation and that abatement was achieved before the time set for abatement.

(2) If the consideration of this criterion is impractical because of the length of the abatement period, the calculation of points may be made without considering this criterion and may be re-calculated after the violation has been abated.

(d) Determination of base penalty.

The division shall determine the base amount of any civil penalty by converting the total number of points calculated under Subsections (a), (b), and (c); ~~and (d)~~ of this section to a dollar amount, according to the following schedule:

Points	Dollars	Points	Dollars
1	50	9	1050
2	100	10	1350
3	175	11	1700
4	250	12	2050
5	325	13	2400
6	400	14	2750
7	475	15	3100
8	750	16	3500

(e) Credit and additional penalties for previous history.

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(1) Except for a violation that resulted in personal injury or fatality to any person, ~~t~~The division shall reduce the base penalty determined under Subsection (d) by 10% if the permittee has had no violations cited by the division within the preceding 12-month period.

(2) The division shall add to the base penalty determined under Subsection (d) additional sums for the permittee's previous history of violations as follows:

(i) Twenty dollars for each violation contained in a notice of violation, up to 10 of such violations;

(ii) Fifty dollars for each violation contained in a notice of violation, in excess of 10 violations;

(iii) One hundred dollars for each violation contained in a cessation order.

(3) A violation shall not be counted if the notice or order is the subject of pending administrative or judicial review or if the time to request such review has not expired, and thereafter it shall be counted for only one year; provided however, that a violation which is subject to administrative or judicial review, or for which the time to request such review has not expired, shall not be disregarded for the purpose of obtaining a 10% reduction pursuant to Subsection (e)(1), unless such administrative or judicial review results in the vacation of the penalty.

(4) No violation for which the notice or order has been vacated shall be counted.

(5) Each violation shall be counted without regard to whether it led to a civil penalty assessment.

(f) The maximum penalty which the division may assess under this section for each cessation order or notice of violation shall be \$5,000, except that if the violation resulted in a personal

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injury or fatality to any person, then the civil penalty determined under Subsection (d) shall be multiplied by a factor of twenty (20), not to exceed \$70,000. As provided in 4 VAC 25-130-845.15, each day of continuing violation may be deemed a separate violation for the purpose of assessing penalties.

4 VAC 25-130-845.15. Assessment of separate violations for each day.

(a) The division may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the division shall consider the factors listed in 4 VAC 25-130-845.13 and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which has been assigned a penalty of \$5,000 or more under 4 VAC 25-130-845.13, the division shall assess a penalty for a minimum of two separate days.

(b) In addition to the civil penalty provided for in Paragraph (a), whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order or as subsequently extended pursuant to §45.1-245B of the Act, a civil penalty of not less than \$750 shall be assessed for each day during which such failure to abate continues, except that:

(1)(i) If suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under §45.1-249C of the Act, after a determination that the person to

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whom the notice or order was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the Director or his authorized representative issues a final order with respect to the violation in question; and

(ii) If the person to whom the notice or order was issued initiates review proceedings under §45.1-251B of the Act with respect to the violation, in which the obligations to abate are suspended by the court pursuant to §45.1-251B of the Act, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court;

(2) Such penalty for the failure to abate the violation shall not be assessed for more than 30 days for each such violation. If the permittee has not abated the violation within the 30 day period, the division shall take appropriate action pursuant to §§45.1-245 and 45.1-246 of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

4VAC25-130-845.18. Procedures for assessment conference.

(a) The division shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom notice or order was issued, if the request is received within 30 days from the date the proposed assessment or reassessment is served.

(b)(1) The division shall assign a conference officer to hold the assessment conference. The assessment conference shall be conducted as an informal proceeding in accordance with §2.2-4019 ~~9-6.14:11~~ of the Code of Virginia. The assessment conference shall be held within 60 days

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from the date the conference request is received or the end of the abatement period, whichever is later. Provided that a failure by the division to hold such conference within 60 days shall not be grounds for dismissal of all or part of an assessment unless the person against whom the proposed penalty has been assessed proves actual prejudice as a result of the delay.

(2) The division shall post notice of the time and place of the conference at the division's office in Big Stone Gap or field office located closest to the mine at least five days before the conference. Any person shall have a right to attend and participate in the conference.

(3) The conference officer shall consider all relevant information on the violation. Within 30 days after the conference is held, the conference officer shall either:

(i) Settle the issue, in which case a settlement agreement shall be prepared and signed by the division and by the person assessed; or

(ii) Affirm, raise, lower, or vacate the penalty.

(4) An increase or reduction of a proposed civil penalty assessment of more than 25% and more than \$500 shall not be final and binding on the division, until approved by the director or his designee.

(c) The division shall promptly serve the person assessed with a notice of the conference decision in the manner provided in 4VAC25-130-845.17(b) and shall include a worksheet if the penalty has been raised or lowered. The reasons for the conference officer's action shall be fully documented in the file.

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(d)(1) If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect.

(2) If full payment of the amount specified in the settlement agreement is not received by the division within 30 days after that date of signing, the division may enforce the agreement or rescind it and proceed according to paragraph (b)(3)(ii) with 30 days from the date of the rescission.

(e) The conference officer may terminate the conference if it is determined that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.

(f) At any formal review proceedings under §§45.1-245 C, 45.1-246 and 45.1-249 of the Act, no evidence as to statements made or evidence produced by one party at a conference shall be introduced as evidence by another party or to impeach a witness.

4VAC25-130-845.19. Request for hearing.

(a) The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the division (to be held in escrow as provided in paragraph (b) of this section) within 30 days from receipt of the proposed assessment or reassessment or 30 days from the date of service of the assessment conference

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decision, whichever is later. The fact of the violation may not be contested if it has been decided in a review proceeding commenced under 4VAC25-130-843.16.

(b) The division shall transfer all funds submitted under paragraph (a) to the State Treasurer's Office which shall hold them in escrow pending completion of the administrative and judicial review process, at which time it shall disburse them as provided in 4VAC25-130-845.20.

(c) The hearing requested pursuant to a petition filed under paragraph (a) of this section shall be conducted as a formal hearing in accordance with the provisions of § 2.2-4020 ~~9-6.14:12~~ of the Code of Virginia. The hearing officer shall cause an accurate verbatim record of the hearing to be made. The division may charge the reasonable cost of preparing such record to any party to the hearing who requests a copy of the record.

(d) All requests for hearing, or appeals for review and reconsideration made under this section; and all notices of appeal for judicial review of a Hearing Officer's final decision, or the final decision on review and reconsideration shall be filed with the Director, Department of Mines, Minerals and Energy, Post Office Drawer 900, Big Stone Gap, Virginia 24219.

4 VAC 25-130-846.14. Amount of the individual civil penalty.

(a) In determining the amount of an individual civil penalty, the division shall consider the criteria specified in §45.1-246(A) of the Act, including:

(1) The individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface coal mining operation;

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(2) The seriousness of the violation, failure or refusal (as indicated by the extent of damage and/or the cost of reclamation), including any irreparable harm to the environment and any hazard to the health or safety of the public; and,

(3) The demonstrated good faith of the individual charged in attempting to achieve rapid compliance after notice of the violation, failure or refusal.

(b) The penalty shall not exceed \$5,000 for each violation, except that if the violation resulted in a personal injury or fatality to any person, then the civil penalty determined under 4 VAC 25-130-845.13 (d) shall be multiplied by a factor of twenty (20), not to exceed \$70,000. Each day of a continuing violation may be deemed a separate violation and the division may assess a separate individual civil penalty for each day the violation, failure or refusal continues, from the date of service of the underlying notice of violation, cessation order or other order incorporated in a final decision issued by the Director, until abatement or compliance is achieved.